IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

ITR Nos.31 to 34 of 1989
Date of decision:22.12.2006

The Commissioner of Income Tax, Patiala

....Petitioner

versus

M/s. Mahavir Spinning Mills Limited, Ludhiana

....Respondent

CORAM: HON'BLE MR. JUSTICE ADARSH KUMAR GOEL
HON'BLE MR. JUSTICE RAJESH BINDAL

Present: Mr. SK Garg Narwana, Advocate, for the revenue.
Mr. Akshay Bhan, Advocate, for the respondent.

JUDGMENT:

Following questions of law have been referred for the opinion of this Court by the Income Tax Appellate Tribunal, Chandigarh Bench, Chandigarh, arising out of its order dated 16.7.1987 in ITA No.308/Chandi/84, for the assessment year 1980-81:-

Question in RA No.184(At the instance of the revenue)

"Whether on the facts and in the circumstances of the case, the Appellate Tribunal is right in law in upholding the order of the learned CIT(Appeals) allowing deduction under section 80HH on the assessee before allowing deduction for investment allowance under section 32A?

Questions in RA No.194(At the instance of the assessee)

1. Whether on the facts and circumstances of the case, the Hon'ble Tribunal was justified in not allowing initial depreciation on Rs.19,781/- spent for workers' toilets?

2. Whether, on the facts and circumstances of the case, the Hon'ble Tribunal was justified in not treating the preoperative expenses as a part of the capital employed for the claim under section 80J?

3. Whether, on the facts and circumstances of the case, the Hon'ble Tribunal was justified in directing the assessing authority to look afresh into the assessee's claim of extra shift allowance on electric installations in spite of the fact that similar matter had been decided by the same Bench in ITA No.389 of 1984 dated 29.1.1986 in the case of the Inspecting Assistant Commissioner of Income tax (Asstt.) Ludhiana v. Vardhman Spinning and General Mills Limited, wherein following the decision in ITA No.80/ASR/1977-78 dated 31.10.1979, the Hon'ble Tribunal had already confirmed that the extra shift allowance is admissible on electric installations as well and also when the above decisions were brought to the kind attention of the Hon'ble Bench?

Questions in RA No.195 (At the instance of the assessee)

1. Whether on facts and circumstances of the case, the Tribunal is justified in not allowing initial depreciation on the construction of cycle stand for the welfare of the workers?

2. Whether on the facts and circumstances of the case the Hon'ble Tribunal was justified in holding Stand cannot be said to be a shelter?

3. Whether on the facts and circumstances of the case, the Hon'ble Tribunal was justified in directing the assessing authority to look afresh into the assessee's claim of extra shift allowance on electric installations in spite of the fact that similar matter had been decided by the same Bench in ITA No.389 of 1984 dated 29.1.1986 in the case of the Inspg. Commissioner of Income tax (Asstt.) Ludhiana v. Vardhman Spinning and General Mills Limited, wherein following the decision in ITA No.80/ASR/1977-78 dated 31.10.1979, the Hon'ble Tribunal had already confirmed that the extra shift allowance is admissible on electric installations as well and also when the above decisions were brought to the kind attention of the Hon'ble Bench?

Questions in RA No.196 (At the instance of the assessee)

1. Whether on the facts and circumstances of the case, the Hon'ble Tribunal was justified in not allowing depreciation as per amended rules retrospectively?

2. Whether on the facts and circumstances of the case, the Tribunal was justified in not treating the preoperative

expenses as a part of the capital employed for the claim under section 80-J?"

A reference to the order of the Assessing Officer shows that the assessee company was incorporated in the year 1973 and its business started in October 1973. Factory of the assessee is situated at Hoshiarpur which is a backward district for purposes of deduction under section 80HH of the Act. The company manufactured cotton, staples and synthetic yarn. First unit went into production w.e.f 1.5.1976 while the second unit started w.e.f 1.7.1978. Claim under section 80HH of the Act was made on profits of unit No.1 which started production w.e.f 1.5.1976. Profits of Unit-II were segregated and it was found that net result in the said unit was loss. However, in appeal, the CIT(A) accepted the interpretation of the assessee and held that investment allowance being in the nature of reserve was to form part of profits and gains of business and relief under section 80HH of the Act was allowable before excluding this allowance from total profit. The Tribunal affirmed this view.

Further, the Assessing Officer held that words profits and gains would mean profits and gains as calculated in accordance with the provisions contained in Sections 30 to 43A of the Act and since investment allowance was deduction under section 32-A of the Act, the same was taken into account for calculating profits and gains for purposes of Section 80HH of the Act.

The Assessing Officer rejected the claim of the assessee for depreciation on amount of Rs.19,781/- spent on workers' toilets under section 32(1)(iv) of the Act, which view was upheld by the CIT(A) as well as the Tribunal.

The assessee claimed relief under section 80J of the Act on the value of work-in-progress and preliminary expenses. The Assessing Officer did not accept the claim with regard to preoperative expenses. However, on appeal, the CIT(A) accepted the claim on the ground that preoperative expenses were part of capital employed in business. The Tribunal set aside this view and held that preoperative expenses could not be included in the 'capital' employed in the business.

There was retrospective change in the rules of depreciation which was held by the Assessing Officer not to be applicable for the year in

question and the said view has been affirmed by the CIT(A) as well as the Tribunal.

The assessee was required to pay interest for delayed filing of return which was affirmed by the CIT(A) and the Tribunal. It was held that whatever may be the reason for delay in filing the return, liability for interest was statutorily provided under section 139(8)/217 of the Act.

Re: Question in RA No.184 (at the instance of the revenue)

Section 80-HH (1) of the Act is as under:-

> "80HH(1) Where the gross total income of an assessee includes any profits and gains derived from an industrial undertaking, or the business of a hotel to which this section applies, there shall, in accordance with and subject to the provisions of this section, be allowed,in computing the total income of the assessee, a deduction from such profits and gains of an amount equal to 20 per cent thereof."

Section 80AB of the Act is as under:-

> "80AB. Where any deduction is required to be made or allowed under any section (except section 80M) included in this Chapter under the heading "C – Deductions in respect of certain incomes' in respect of any income of the nature specified in that section which is included in the gross total Income of the assessee, then notwithstanding anything contained in that section, for the purpose of computing the deduction under that section, the amount of income of that nature as computed in accordance with the provisions of this Act (before making any deduction under this Chapter) shall alone be deemed to be the amount of Income of that nature which is derived or received by the assessee and which is included in his gross total income."

The above provisions show that for purposes of Section 80HH (1) of the Act, income computed in accordance with "this Act" is deemed to be income to be included in gross total income for purposes of Chapter VI-A. It is further clear that deduction under Chapter VI-A is not to be taken into account. In other words, computation has to be made in accordance with the Act for calculating the income. Section 29 of the Act prescribes that income is to be computed in accordance with the provisions of sections

30 to 43A of the Act. Income for purposes of Section 80 HH of the Act, thus, is income computed in accordance with section 29 of the Act, i.e., after taking into account deduction under section 32A of the Act also.

The question was gone into by the Rajasthan high Court in **CIT v. Loonkar Tools Private Limited,** (1995) 213 ITR 721. In the said judgment, reliance was also placed on judgment of the Hon'ble Supreme Court in **Cambay Electric Supply Industrial Co. Limited v. CIT,** (1978) 113 ITR 84 to the following effect:-

> "On reading sub-section (1), it will become clear that three important steps are required to be taken before the special deduction permissible thereunder is allowed and the net total income exigible to tax is determined. First, compute the total income of the concerned assessee in accordance with the other provisions of the Act i.e., in accordance with all the provisions except section 80E; secondly, ascertain what part of the total income so computed represents the profits and gains attributable to the business of the specified industry (here generation and distribution of electricity); and, thirdly, if there be profits and gains so attributable, deduct eight per cent thereof from such profits and gains and then arrive at the net total income exigible to tax. As regards the first step mentioned above, the important words in sub-section (1) are those that appear in parenthesis, namely, 'as computed in accordance with the other provisions of this Act' and these words clearly contain a mandate that the total income of the concerned assessee must be computed in accordance with the other provisions of the Act without reference to section 80E and since in the instant case, it is income from business the same as per section 29 will have to be computed in accordance with sections 30 to 43A which would include section 41(2). It is also clear that under the second step the profits and gains attributable to the business of the specified industry (here generation and distribution of electricity) forms a component of the total income spoken of in the first step. Reading these two steps together, therefore, it is obvious that in computing the total income of the concerned assessee the balancing charge arising as a result of the sale of old machinery and buildings and worked out as per section 41(2), irrespective of its real character, will have to be taken into account and included as income of the business. In other words, the balancing charge as worked out under section 41(2) will have to be taken into account before computing the deduction of eight per cent under the third step. On a proper construction of sub-section (1) and having regard

> to the legislative mandate contained in the three steps that are required to be taken in the manner indicated above we are clearly of the view that the item of Rs. 7,55,807/- will have to be taken into account before computing the eight per cent deduction contemplated by the said provision."

Reliance was also placed on judgment of the Hon'ble Supreme Court in **Distributors (Baroda) P.Limited v. UOI,** (1985) 155 ITR 120 to the following effect:-

> "The opening words describe the condition which must be fulfilled in order to attract the applicability of the provision contained in sub-section (1) of section 80M. The condition is that the gross total income of the assessee must include income by way of dividends from a domestic company. 'Gross total income' is defined in section 80B, clause (5), to mean the 'total income computed in accordance with the provisions of the Act before making any deduction under Chapter VI-A or under section 280-O'. Income by way of dividends from a domestic company included in the gross total income would, therefore, obviously be income computed in accordance with the provisions of the Act, that is, after deducting interest on monies borrowed for earning such income. If income by way of dividends from a domestic company computed in accordance with the provisions of the Act is included in the gross total income, or, in other words, forms part of the gross total income, the condition specified in the opening part of sub-section (1) of section 80M would be fulfilled and the provision enacted in that sub-section would be attracted."

Judgment of the Orissa High Court in **CIT v. Tarun Udyog,** (1991) 191 ITR 688, which was relied upon on behalf of the assessee, was dissented from on the ground that the same was contrary to the plain language of the statute. Same view was taken by the Rajasthan High Court in **CIT v. Vishnu Oil and Dal Mills,** (1996) 218 ITR 71, **CIT v. Rajasthan Udyog,** (1997) 225 ITR 468 and **CIT v. Aggarwal Gum Industries,** (2001) 250 ITR 843.

Learned counsel for the assessee submitted that view taken by the Orissa High Court should be preferred over the view taken by the Rajasthan High Court.

We are unable to accept the submission made on behalf of the

assessee. We are in respectful agreement with the Rajasthan High Court in judgments referred to above.

Still further, we find that in the judgment of the Hon'ble Supreme Court in **Moti Lal Pesticides (1) Pvt. Limited v. CIT,** (2000) 243 ITR 26, it was held that the deduction under Section 80HH of the Act has to be allowed on the net income and not from gross income. Even otherwise, definition of term "Gross total income" defined for the purpose of Chapter VI-A as contained in Section 80-B(5) of the Act clearly provides that for the purpose of this Chapter, gross total income means total income computed in accordance with the provisions of this Act before making any deduction under this Chapter. It cannot be disputed that the deductions under Sections 32-A/32-B of the Act are allowed while computing income before any deduction is allowed under Chapter VI-A. The provisions of the Act being quite explicit, there is no scope for taking a view different than what is enumerated therein.

Accordingly, the question referred is answered in favour of the revenue and against the assessee while holding that the Tribunal was not right in concluding that deduction under Sections 80HH of the Act was to be allowed before allowing under Sections 32-A/32-B of the Act.

Re: Q.No.1 in RA No.194 & Q.Nos.1 and 2 in RA No.195

Provisions of Section 32(1)(iv) of the Act, as in force at the relevant time are as under:-

> "32.**Depreciation** – (1) In respect of depreciation of buildings, machinery, plant or furniture owned by the assessee and used for the purposes of the business or profession, the following deduction shall, subject to the provisions of section 34 be allowed - ...
>
> (i) to (iii) xx xx xx
>
> (iv) in the case of any building which has been newly erected after the 31st day of march, 1961, where the building is used solely for the purposes of residence of persons employed in the business and the income of each such person chargeable under the head "Salaries" is ten thousand rupees or less, or where the building is used solely or mainly for the welfare of such persons as a

> hospital, creche, school, canteen, library, recreational centre, shelter, rest-room or lunch-room, a sum equal to forty per cent of the actual cost of the building to the assessee in respect of the previous year of erection of the building."

A reference to the above provisions shows that depreciation in respect of new buildings is available if the building is used solely or mainly for welfare of persons having salary of Rs.10,000/- or less. Specification of sum of the buildings i.e., hospital, creche, school, canteen, library, recreational centre, shelter, rest-room or lunch-room, is only by way of illustration while qualification for claiming initial depreciation is that the building should be used solely or mainly for welfare of such persons. Applying the said test, it cannot be held that the investment for providing cycle stand or toilets to the employees did not qualify for initial depreciation. The view taken by the Tribunal that depreciation will not be admissible in respect of building or amenities which the employer was bound to provide by virtue of statutory obligation under Factories Act or otherwise, cannot be held to be sound. Whatever may be the reason for the employer to provide facilities, is not relevant for determining permissibility of determination, if such benefit is available on a clear reading of the statutory provision itself.

The questions referred are, thus, answered in favour of the assessee and against the revenue.

Re: Q.No.3 in RA No.194 and Q.No.2 in RA No.196

Identical question has been gone into by this Court in ITR No.29 of 1993, **M/s. Sangrur Vanaspati Mills Limited v. The Commissioner of Incoem Tax, Patiala,** decided on 15.9.2006, wherein the question was as under:-

> "Whether on the facts and in the circumstances of the case, the Appellate Tribunal was justified in holding that the assessee was not entitled to capitalize the expenditure of Rs.1,86,300/- incurred on electric line feeder etc. prior to commencement of business?"

The question was answered in favour of the assessee and against the

revenue, inter-alia, relying upon judgment of the Hon'ble Supreme Court in ***Challapalli Sugar Ltd. v. The Commissioner of Income-tax*** (1975) 98 ITR 167 , wherein it was observed as under:-

> "It would appear from the above that the accepted accountancy rule for determining the cost of fixed assets is to include all expenditure necessary to bring such assets into existence and to put them in working condition. In case money is borrowed by a newly started company which is in the process of constructing and erecting its plant, the interest incurred before the commencement of production on such borrowed money can be capitalized and added to the cost of the fixed assets which have been created as a result of such expenditure. The above rule of accountancy should, in our view, be adopted for determining the actual cost of the assets in the absence of any statutory definition or other indication to the contrary."

In view of the above, the questions referred are answered in favour of the assessee and against the revenue.

Re:Q.No.1 in RA No.196

The assessee was allowed depreciation as per rules applicable at the relevant time. Subsequent amendment in the rules about the rate of depreciation could not be held to be retrospective. The Tribunal was, thus, justified in holding that the amended rules could not be applied retrospectively and the assessee could not get benefit of amended rules which were not in force at the relevant time.

The question referred is, thus, answered against the assessee and in favour of the revenue.

No other issue has been pressed.

Reference is disposed of accordingly.

(Adarsh Kumar Goel)
Judge

December 22, 2006 (Rajesh Bindal)
'gs' Judge